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ATTORNEYS FOR DEFENDANT
PROFESSIONAL COLLECTION
CONSULTANTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK C. BOON,

Plaintiff,

-vs-

PROFESSIONAL COLLECTION
CONSULTANTS,

Defendant.

Federal Civil
Case Number: 12CV3081-H-WMC

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
NOTICE OF MOTION FOR
FINDING OF BAD FAITH &
HARASSMENT AND FOR AWARD
OF ATTORNEY FEES

Date: April 14, 2014
Time: 10:30 am
Judge: MARILYN HUFF
ROOM 15A
ANNEX
(ORAL ARGUMENT REQUESTED)

Defendant Professional Collection Consultants hereby
submits the following points and authorities in support
of its Motion for Finding of Bad Faith and Harassment and
request for award of attorney fees for legal services
rendered in response to Plaintiff's Third Amended
Complaint. Note, Defendant Professional Collection

1 Consultants does not claim that the original Complaint,
2 First Amended Complaint, or the Second Amended Complaint
3 were filed in bad faith, and Professional Collection
4 Consultants does not seek fees incurred defending those
5 Complaints.

6 **I. PLAINTIFF'S FILING OF THE THIRD AMENDED COMPLAINT**
7 **WAS IN BAD FAITH.**

8 Defendant Professional Collection Consultants
9 (PCC), by counsel, moves for an award of attorneys' fees
10 associated with the defense of the Plaintiff's Third
11 Amended Complaint, pursuant to *Fed. R. Civ. P. 54(d)* and
12 the bad faith exception to the American rule against the
13 award of attorneys' fees. Plaintiff's third amended
14 complaint was initiated and conducted in bad faith. It
15 was vexatious, frivolous, unreasonable and without fact
16 or foundation. Accordingly, a finding of bad faith and an
17 award of attorneys' fees to Defendant PCC is appropriate.

18 "...

19 (2) *Attorney's Fees.*

20 (A) *Claim to Be by Motion.* A claim for attorney's
21 fees and related nontaxable expenses must be made by
22 motion unless the substantive law requires those fees
to be proved at trial as an element of damages.

23 (B) *Timing and Contents of the Motion.* Unless a
24 statute or a court order provides otherwise, the
motion must:

25 (i) be filed no later than 14 days after the entry of
26 judgment;

27 (ii) specify the judgment and the statute, rule, or
28 other grounds entitling the movant to the award;

1 (iii) state the amount sought or provide a fair
2 estimate of it; and

3 (iv) disclose, if the court so orders, the terms of
4 any agreement about fees for the services for which
5 the claim is made.

6 When a civil lawsuit under the Fair Debt Collection
7 Practices Act has been initiated and conducted in bad
8 faith, a defendant may recover the attorneys' fees
9 expended. 15 U.S.C. 1692k(a) provides:

10 "..."(3) in the case of any successful action to
11 enforce the foregoing liability, the costs of the
12 action, together with a reasonable attorney's fee as
13 determined by the court. On a finding by the court
14 that an action under this section was brought in bad
15 faith and for the purpose of harassment, the court
16 may award to the defendant attorney's fees reasonable
17 in relation to the work expended and costs."

18 Plaintiff, in bad faith and for the purpose of
19 harassment, attempted to state a causes of action in the
20 Third Amended Complaint for "The State Court Action
21 Allegations," "The Delaware Three Year Statute Applies,"
22 "The Delaware Statute was not Tolloed," and "No Federal
23 Statute of Limitations Exists that Preempts Delaware's",
24 All of these allegations were previously pleaded and
25 decided upon by Judge Huff in her Orders Granting Motion
26 to Dismiss the First Amended Complaint dated August 1,
27 2013 and the Order Granting Defendant's Motion to Dismiss
28 with Leave to Amend dated October 17, 2013 and should not
have been alleged or included in Plaintiff's Third
Amended Complaint under the "Law of the Case Doctrine."
These are all examples of bad faith and harassment.

1
2 Immediately after this lawsuit was filed, Clark
3 Garen, counsel for Defendant, contacted counsel for
4 Plaintiff to determine if Boon alleged any violations
5 other than the Delaware three year statute of
6 limitations. Patric Lester, counsel for Plaintiff assured
7 Clark Garen that the only violations at issue were the
8 applicability of the three year Delaware Statute of
9 Limitation. Counsel then discussed their desire to appeal
10 any ruling of this court to obtain binding precedent on
11 this issue.
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16 When Plaintiff failed to prevail on the Delaware
17 three year statute of limitations, Plaintiff, in bad
18 faith and for the purpose of harassment, sought to create
19 a triable issue of fact by alleging that Defendant filed
20 the underlying lawsuit against Boon without being in
21 possession of adequate documentation. Plaintiff filed
22 this lawsuit without any documentation, facts, or
23 evidence whatsoever, an indication of bad faith and that
24 the purpose of the lawsuit was for harassment.
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27 Plaintiff's Opposition to the Summary Judgment
28

1 offered no inference or any fact to contradict or create
2 an issue of act with reference to any of the evidence
3 presented by defendant. What is considered "bad faith"
4 was addressed in *Glick v. Koenig*, 766 F.2d 265, 270 (7th
5 Cir. 1985):
6

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8 "In the district court's opinion, plaintiff had
9 "*demonstrated bad faith in both the purpose and
10 conduct of this litigation...." Ordinarily, fees
11 are not awarded absent statutory authorization.
12 A district court, however, may award fees when
13 the losing litigant has "acted in bad faith,
14 vexatiously, wantonly, or for oppressive
15 reasons." *Alyeska Pipeline Service Co. v.*
16 *Wilderness Society*, 421 U.S. 240, 258-59, 95
17 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975). Bad
18 faith has been defined as conduct without at
19 least a colorable basis in law. *Benner v.*
20 *Negley*, 725 F.2d 446, 449 (7th Cir.1984). Thus,
21 the filing of a frivolous lawsuit may
22 demonstrate bad faith where the suit is so
23 completely without hope of succeeding that the
24 court can infer that the plaintiff brought the
25 suit to harass the defendants rather than to
26 obtain a favorable judgment. *Bittner v. Sadoff &*
27 *Rudoy Industries*, 728 F.2d 820, 828 (7th
28 Cir.1984); *Coyne-Delany Co. v. Capital*
Development Board, 717 F.2d 385, 390 (7th
Cir.1983). We agree, as did the district court,
with Judge Nelson's characterization of the
lawsuit as "a transparent attempt to bully the
administration of justice." Plaintiff's
complaint was totally without merit and appears
to have been filed for the purpose of harassing
and retaliating against those parties connected
with the imposition of a fine for a traffic
violation. Such conduct will not be tolerated.

1 Accordingly, the award of attorneys' fees was
2 proper."

3 Judge Huff addressed the "merit" of Plaintiff's Third
4 Amended Complaint in the ruling on Defendant's Motion for
5 Summary Judgment in the following three quotes from the
6 Judge's Order dated January 30, 2014:

7
8 (1) "Boon opposes the motion for summary judgment, but
9 puts forward **no affirmative evidence** to demonstrate
10 a genuine issue of material fact." (Order Granting
11 Defendant's Motion for summary Judgment at P. 4,
12 lines 23-25).

13 (2) "Boon responds with **conclusory allegation** that
14 PCC's filing of the state court action constituted a
15 violation of the FDCPA because PCC acted in bad faith
16 and without documentation. But Boon has **failed to**
17 **produce any evidence to show bad faith on the part of**
18 **PCC in the state court action.**" (Order Granting
19 Defendant's Motion for summary Judgment at P. 6,
20 lines 5-8).

21 (3) "**Boon has submitted no evidence** to dispute that
22 PCC initiated a suit based on common law causes of
23 action in California state court against a California
24 resident." (Order Granting Defendant's Motion for
25 summary Judgment at P. 7, lines 20-22).

26 Therefore, the Order Granting Summary Judgment signed
27 by Judge Huff on January 30, 2014 establishes that the
28 Third Amended Complaint was filed in bad faith and for
the purpose of harassment.

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2 **II. DEFENDANT IS ENTITLED TO ATTORNEYS' FEES UNDER THE**
3 **BAD FAITH EXCEPTION TO THE AMERICAN RULE**
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5 The filing of Plaintiff's Third Amended Complaint was
6 in "bad faith". Under the bad faith exception to the
7 American rule against attorneys' fees, a prevailing party
8 is entitled to attorneys' fees where the litigation was
9 instituted and/or maintained in bad faith. *Alyeska*
10 *Pipeline Serv. Co. v Wilderness Soc'y*, 421 U.S. 240, 258-
11 259 (1975). The Supreme Court stated, "Bad faith may be
12 found, not only in the action that led to the lawsuit,
13 but also in the conduct of the litigation."
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17 "The fact that a defendant is entitled to summary
18 judgment does not provide the basis for such a
19 finding; there must be evidence that the
20 Plaintiff both knew that his claim was meritless
21 and pursued it with the purpose of harassing the
22 defendant. See *Spira v. Ashwood Financial, Inc.*,
23 358 F.Supp.2d 150, 161 (E.D.N.Y.2005) (noting
24 that in addition to succeeding on the merits,
25 defendant must meet the statutory standard of
26 proving bad faith and harassment)."
27

28 *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F.
Supp. 2d 133, 141 (E.D.N.Y. 2006) aff'd in part,
vacated in part, rev'd in part, 516 F.3d 85 (2d
Cir. 2008)

In determining whether an action has been filed in

1 bad faith, the court has relied upon the standards set in
2 *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990). Judge Davis
3 held "whether or not a pleading has a foundation in fact
4 or is well grounded in law still often influences the
5 determination of the signer's purpose." See *Contract*
6 *Materials Processing, Inc. V Kataleuna GMBH Catalysts*, 222
7 F. Supp. 2d 733, 744-745 (D. Md. 2002), citing *In re*
8 *Kunstler*, 914 F.2d at 518.

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11 **III. DEFENDANT IS ENTITLED TO ATTORNEYS' FEES UNDER RULE**
12 **11 ON THE BASIS THAT THE CLAIMS OF THE THIRD AMENDED**
13 **COMPLAINT ARE NOT WARRANTED BY EXISTING LAW AND THE**
14 **FACTUAL CONTENTIONS HAVE NO EVIDENTIARY SUPPORT.**

15 *Federal Rules of Civil Procedure 11* provides in part

16 "By presenting to the court a pleading, written
17 motion, or other paper--whether by signing, filing,
18 submitting, or later advocating it--an attorney or
19 unrepresented party certifies that to the best of the
20 person's knowledge, information, and belief, formed
after an inquiry reasonable under the circumstances:

21 (1) it is not being presented for any improper
22 purpose, such as to harass, cause unnecessary delay,
23 or needlessly increase the cost of litigation;

24 (2) the claims, defenses, and other legal contentions
25 are warranted by existing law or by a nonfrivolous
26 argument for extending, modifying, or reversing
existing law or for establishing new law;

27 (3) the factual contentions have evidentiary support
28 or, if specifically so identified, will likely have

1 evidentiary support after a reasonable opportunity
2 for further investigation or discovery; and

3 (4) the denials of factual contentions are warranted
4 on the evidence or, if specifically so identified,
5 are reasonably based on belief or a lack of
information."

6 Plaintiff's Third Amended Complaint contained
7
8 allegations unsupported by fact and claims not warranted
9 by existing law and by previous rulings of Judge Huff in
10 the Order Granting Defendant's Motion to Dismiss First
11 and Second Amended Complaints.
12

13 **IV. DESCRIPTION OF WORK PERFORMED BY DEFENDANT'S**
14 **ATTORNEYS.**

15 The Affidavits of Defendant's counsel, Greg Lawrence
16 and Clark Garen, contains detailed statements of legal
17 services rendered as to services rendered in the defense
18 of the Third Amended Complaint and subsequent Motions and
19 Replies. Defendant seeks the recovery of fees charged by
20 Attorneys Lawrence & Garen in the sum of \$31,830.00 as to
21 the period from November 17, 2013 through January 24,
22 2014 representing reasonable fees incurred in defending
23 the third amended complaint.
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3 **V. CONCLUSION**

4 For the reasons stated herein, Defendant PCC hereby
5 request a finding that the Plaintiff's Third Amended
6 Complaint was filed in bad faith and the Defendant be
7 awarded attorney fees in the sum of \$31,830.00.
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11 Dated: February 11, 2014

12 LAW OFFICES OF CLARK GAREN

13 BY

14 /s/ Greg Lawrence

15 GREG LAWRENCE

16 Attorney for Defendant

17 Professional Collection Consultants

18 Email: glawrence53@aol.com
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CERTIFICATE OF SERVICE

I certify that on February 11, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern District of California by using the CM/ECF system.

I further certify that all of the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Greg Lawrence

GREG LAWRENCE, SB 82243